No. 80-805

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In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT, ET AL., APPELLANTS

v.

COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in setting aside the January 15, 1977, special election of the Permanent Board of Trustees of the Westheimer Independent School District after concluding that the election violated Section 5 of the Voting Rights Act of 1965.

2. Whether the district court abused its discretion in requiring the School District to surrender to the clerk all materials concerning the invalidated election and all records pertaining to the District's post-election operations.

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Pursuant to Rule 16 of the Rules of this Court, the United States moves for affirmance of the judgment of the district court insofar as it invalidates the January 15, 1977, election conducted by the Interim Board of Trustees of the Westheimer Independent School District and requires surrender to the court of materials and records relating to that election.[1]

OPINION BELOW

The opinion of the district court (J.S. App. A-1 to A-20) is reported at 494 F. Supp. 738.

JURISDICTION

The judgment of the district court (J.S. App. C-1 to C-3) was entered on July 1, 1980. Cross-appellants' motion for rehearing was denied on August 27, 1980 (J.S. App. C-4). A notice of appeal was filed on September 19, 1980 (J.S. App. D-4 to D-5), and the jurisdictional statement was filed on November 17, 1980. The jurisdiction of this Court is invoked under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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[1]The judgment also awards the Coalition to Preserve Houston and the Houston Independent School District attorneys' fees and costs, to be paid by the Westheimer Independent School District and its Interim Board of Trustees (J.S. App. C-3). The Coalition has sought review of this award in this Court (No. 80-697, filed October 27, 1980), contending that the award is too low and that the court should have made the state government and the county board of education, as well as the Westheimer Board, liable for the fee awarded. The United States took no position in the district court concerning the appropriateness of the fee award and we express no view on that question here.

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such * * * standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such * * * standard, practice, or procedure: *Provided,* That such * * * standard, practice, or procedure may be enforced without such proceeding if * * * [it] has been submitted by the chief legal officer * * * of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission * * *.

STATEMENT

1. This cross-appeal arises from the January 15, 1977, election of the Permanent Board of Trustees of the Westheimer Independent School District (WISD).[2] On December 17, 1976, the Attorney General received a letter from the Interim Board of Trustees of WISD requesting preclearance of the January 15 election pursuant to Section 5 of the Voting Rights Act (J.S. App. A-2, A-5). The Attorney General was unable to determine that the proposed election would not have the purpose or effect of discriminating on the basis of race, and, accordingly, on January 13, 1977, interposed an objection under the Act to the proposed election (*ibid.*).

The following day the Coalition to Preserve Houston and the Houston Independent School District ("the Coalition") filed suit under Section 5 seeking to enjoin the election. United States District Judge Hannay, without opinion, denied the Coalition's request to convene a three-judge court and refused to issue a temporary restraining order. The election was held on January 15 and the Permanent Board of Trustees of WISD was elected (J.S. App. A-2).

On January 20, 1977, the United States filed suit for declaratory and injunctive relief, alleging that the election violated Section 5 (*ibid.*).

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[2]WISD was created in 1972 by order of the County School Trustees of Harris County, Texas (J.S. 4). The formation of the school district was challenged on the ground that it would impede desegregation of the Houston Independent School District (HISD). After extensive litigation, the United States Court of Appeals for the Fifth Circuit held that WISD could maintain the corporate status it had perfected under Texas law and could "pursue those of its organizational rights under state law that do not involve the independent operation of a portion of HISD as WISD." *Ross* v. *Houston Independent School District*, 583 F. 2d 712, 716 (1978).

The Coalition appealed Judge Hannay's order denying relief but later sought dismissal of the appeal in order to renew its request for a three-judge court. The Coalition also sought consolidation of its case with the government's. The court of appeals for the Fifth Circuit dismissed the appeal without prejudice to the Coalition's right to request the convening of a three-judge court J.S. App. A-2

On July 1, 1977, United States District Judge Noel vacated Judge Hannay's January 14, 1977, order, consolidated the two cases, and requested the convening of a three-judge court (*ibid.*). Shortly thereafter, Chief Circuit Judge Brown joined the WISD cases with a series of cases pending before a three-judge court in the Northern District of Texas, all of which presented the question whether Texas school districts and municipalities which do not register voters are subject to the preclearance requirements of Section 5 (*id.* at A-3).

The three-judge court in the Northern District of Texas, on the basis of this Court's decision in *United States* v. *Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978), held that school districts and municipalities in Texas are subject to the requirements of Section 5 of the Act (J.S. App. A-3, B-1). The court enjoined the defendants in these cases from conducting elections under voting procedures different from those in effect on November 1, 1972, unless the requirements of Section 5 are satisfied (J.S. App. A-4, B-1). On September 12, 1978, the court severed the WISD cases from those in the Northern District of Texas and remanded them to the Southern District for entry of judgment. The United States and the Coalition then moved for judgment, and the Coalition moved also for an award of attorneys' fees (J.S. App. A-4). A three-judge court was convened in January 1980 and a hearing was held on May 2, 1980 (J.S. B-7). The court issued its opinion and final judgment on July 1, 1980 (J.S. App. A-1 to A-20).

2. The district court held that Texas school districts are subject to Section 5 of the Voting Rights Act (J.S. App. A-2, note 1; C-2). The court ruled that the January 15, 1977, election violated Section 5 and was therefore without legal effect (J.S. App. C-2). The court enjoined the Interim Board from taking any action to conduct an election for the school district under voting procedures enacted after November 1, 1972, unless such procedures were approved in accordance with the provisions of Section 5 (*ibid.*). In addition, the court dissolved the Permanent Board of Trustees of the Westheimer Independent School District and invalidated its official acts (*ibid.*). The court's order also required the school district to deliver to the clerk all voting materials concerning the invalidated election and all documents pertaining to the district's operations after the election (J.S. App. C-3). Finally, the court awarded the Coalition attorneys' fees and costs, to be paid by WISD (*ibid.*).

The Coalition appealed from the portion of the judgment concerning attorneys' fees,[3] and WISD cross-appealed.

ARGUMENT

There can be little doubt that the January 15, 1977, election violated the requirements of Section 5 of the Voting Rights Act. It is undisputed on this appeal that WISD is a jurisdiction subject to Section 5 which did not obtain preclearance of a change in voting practices. The Attorney General interposed an objection under Section 5 prior to the holding of this election. Immediately thereafter suit was brought to enjoin the election. In these circumstances, the district court's order setting aside the results of the election was well within its remedial powers, as established in this Court's decisions interpreting Section 5. Accordingly, this appeal raises no issue requiring plenary consideration by the Court.

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[3]See note 1, *supra*.

1. Cross-appellants do not appear seriously to contest the district court's ruling that the challenged election violates the provisions of Section 5. Their only contention that relates to the existence of the Section 5 violation (as opposed to the relief granted) is that the court "erred in refusing to consider, to any extent, the various defenses pleaded by the WISD" (J.S. 10). But the district court, in footnote 11 of its opinion (J.S. A-19), specifically addressed and rejected the sixteen defenses[4] set out in WISD's opposition to the motions for judgment.[5]

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[4]The district court properly rejected cross-appellants' defenses of collateral estoppel and res judicata on the grounds that *Ross* v. *Houston Independent School District* (see note 2, *supra*) did not involve the applicability of the Voting Rights Act to WISD and that Judge Hannay's order denying a temporary restraining order and refusing to convene a three-judge court (see page 3, *supra*) was not a final judgment and was subsequently vacated by Judge Noel. The court also correctly ruled that the other issues were either resolved by this Court in *Sheffield* (see page 4, *supra*) or by the ruling of the three-judge court in the Northern District of Texas (see page 4, *supra*), or were properly cognizable only in the United States District Court for the District of Columbia (see, *e.g.*, *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971)).

[5]WISD assigns as "[p]erhaps the most compelling" of its sixteen defenses its contention that it had not enacted or sought to administer any voting procedure different from that in effect on November 1, 1972 (J.S. 10):

> If the WISD had not been enjoined in the *Delores Ross* case in 1973, this school district could have conducted its formative election in April of that year. This was *two years* prior to the time that the Voting Rights Act became applicable to Texas. Accordingly, there was no "change in voting practice or procedures" as a result of the subject election which would trigger the provisions of the Act.

This argument simply blinks reality. That the School District could have conducted the election in question several years earlier, had it not been enjoined by a federal court from doing so, is irrelevant. In fact, the January 15, 1977, election was a special election, the first ever held for the Permanent Board of Trustees of WISD. It was conducted pursuant to election orders of the Interim Board of Trustees issued on October 14, November 11, and December 9, 1976 (J.S. App. C-2).

2. *Perkins* v. *Matthews,* 400 U.S. 379 (1971), and *Berry* v. *Doles,* 438 U.S. 190 (1978) (per curiam), make clear that in a case like this where elections have been held in violation of the preclearance requirements of Section 5 it is appropriate to set aside the election results.[6] *Perkins* recognizes that the effectiveness of Section 5, which is dependent upon voluntary compliance, would be seriously undermined if the results of violations are permitted to stand. That is especially true here, where the jurisdiction acted in complete disregard of the Attorney General's objection (J.S. App. A-5). Nor, as *Berry* makes clear, is this relief any less appropriate when suit is brought shortly before the election is held (438 U.S. at 191). Plaintiffs sued immediately after the objection was interposed. The WISD was certainly on notice that the election would be illegal. Thus this case is in clear contrast to *Allen* v. *State Board of Elections,* 393 U.S. 544, 572 (1969), which the Court described as "involv[ing] complex issues of first impression," concerning voting changes that "were not so clearly subject to § 5 that the [State's] failure to submit them for approval constituted deliberate defiance of the Act."

Cross-appellants argue (J.S. 8-9) that they did not deliberately defy the Act because Judge Hannay had refused the Coalition's request to enjoin the election and because, after preclearance was sought, they learned of the district court decision in *United States* v. *Board of Commissioners of Sheffield, Alabama,* 430 F. Supp. 786 (N.D. Ala. 1976),

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[6]If preclearance has not been sought, these cases indicate that the court should first afford local officials the opportunity to seek it.

holding that political entities that do not register voters, like WISD, are not covered by Section 5 of the Act. Judge Hannay's refusal to issue a temporary restraining order to halt the scheduled election, however, was not an adjudication on the merits that the election complied with the requirements of Section 5. Rather, that decision reflects only Judge Hannay's determination that the Coalition had failed to demonstrate the prerequisites for interlocutory relief. Moreover, the district court's decision in *Sheffield* was of doubtful validity and was not controlling authority in the Southern District of Texas. The WISD cannot be excused from compliance simply because a legal objection to Section 5 coverage was raised and upheld by a single district court. As this Court observed in reversing that decision, *United States* v. *Board of Commissioners of Sheffield, Alabama, supra,* 435 U.S. at 118, "the District Court's construction is flatly inconsistent with the Attorney General's consistent interpretations of § 5 and with the legislative history of its enactment and re-enactments."[7]

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[7] *Williams* v. *Rhodes,* 393 U.S. 23 (1968), upon which WISD also relies (J.S. 9), is inapposite. In *Williams,* the Court had before it the question whether it should require a state, shortly before a presidential election, to place the name of a political party and its candidates on the ballot. That case simply does not involve the postponing or setting aside of an illegal election.

For these reasons, the district court properly refused to allow the results of the challenged election to stand.[8]

3. WISD also asserts (J.S. 10) that "the three-judge court exceeded its jurisdiction in commanding WISD to surrender all voting materials and district records accumulated since January 15, 1977." The United States did not request such relief in its complaint and the trial court gave no reasons for its order to surrender these materials. Cross-appellants, however, have not shown that they will suffer any harm as a result of this order, and are free to request the district court to order the release of the records if they are needed. In these circumstances, the question whether the trial court abused its discretion in ordering WISD to surrender the materials at issue is not a substantial question requiring plenary consideration by this Court.[9] See Rule 16(1)(c) of the Rules of this Court.

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[8]Cross-appellants assert (J.S. 9-10) that, "[a]t the very least, the court should have modified its Judgment so as to require the Department of Justice and the Interim Board of WISD to meet to determine whether defects in the January 15, 1977, election could be cured, and to permit the holding of future elections which comply with the Voting Rights Act." The defects in the election can only be "cured" by conducting a new election pursuant to procedures that have been precleared as required by Section 5. Moreover, nothing in the district court's judgment precludes WISD from holding future elections that comply with the Act: the judgment enjoins the Interim Board only from conducting future elections under changed voting procedures "unless and until all of the provisions of the [Act] are complied with" (J.S. App. C-2).

[9]Contrary to WISD's assertion (J.S. 10), the order compelling the surrender of records does not conflict with the ruling of the United States Court of Appeals for the Fifth Circuit in *Ross* v. *Houston Independent School District, supra.* This order in no way alters WISD's status as a corporation established under Texas law.

CONCLUSION

The judgment of the district court, insofar as it sets aside the January 15, 1977, election of the Permanent Board of Trustees of the Westheimer Independent School District and requires surrender to the court of materials and records relating to that election, should be affirmed.

Respectfully submitted.

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